

Pierre R. Yanney (PY-0626)
DARBY & DARBY, P.C.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0042
Tel: (212) 527-7700
Fax: (212) 527-7701
E-mail: pyanney@darbylaw.com

Attorneys for Defendant-Counterclaim Plaintiff
MushyGushy.com, LLC

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PIXFUSION LLC,
Plaintiff/Counterclaim Defendant,
v.
MUSHYGUSHY.COM, LLC,
Defendant/Counterclaim Plaintiff.

Civil Action No. 1:08-cv-04223-RJH (HBP)

ANSWER AND COUNTERCLAIMS

**ECF CASE
ELECTRONICALLY FILED**

JURY TRIAL DEMANDED

Defendant/Counterclaim Plaintiff MushyGushy.com, LLC (“MushyGushy”) hereby answers and presents its defenses and counterclaims to Plaintiff/Counterclaim Defendant PixFusion LLC’s (“PixFusion”) Complaint.

PARTIES

1. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the Complaint, and therefore denies the same.
2. MushyGushy admits the allegations set forth in paragraph 2 of the Complaint.

JURISDICTION AND VENUE

3. MushyGushy admits that this action arises under the Acts of Congress relating to patents, including Sections 101 *et seq.* of Title 35 of the United States Code. MushyGushy is without information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 3 of the Complaint, and therefore denies the same.

4. MushyGushy admits the allegations set forth in paragraph 4 of the Complaint.

5. MushyGushy admits that it offers its services over the Internet. MushyGushy denies the remaining allegations set forth in paragraph 5 of the Complaint.

6. MushyGushy admits the allegations set forth in paragraph 6 of the Complaint.

FACTUAL BACKGROUND

7. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the Complaint, and therefore denies the same.

8. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 8 of the Complaint, and therefore denies the same.

9. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 9 of the Complaint, and therefore denies the same.

10. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 10 of the Complaint, and therefore denies the same.

11. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 11 of the Complaint, and therefore denies the same.

12. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Complaint, and therefore denies the same.

13. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 13 of the Complaint, and therefore denies the same.

14. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 14 of the Complaint, and therefore denies the same.

15. MushyGushy admits that U.S. Patent No. 6,351,265 is entitled "Method and Apparatus for Producing an Electronic Image," and that it issued February 26, 2002. MushyGushy is without information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 15 of the Complaint, and therefore denies the same.

16. MushyGushy admits that U.S. Patent No. 5,623,587 is entitled "Method and Apparatus for Producing an Electronic Image." MushyGushy denies that U.S. Patent No. 5,623,587 issued April 22, 1992. MushyGushy is without information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 16 of the Complaint, and therefore denies the same.

17. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 17 of the Complaint, and therefore denies the same.

18. MushyGushy is without information sufficient to form a belief as to the truth of the allegations set forth in paragraph 18 of the Complaint, and therefore denies the same.

19. MushyGushy admits the allegations set forth in paragraph 19 of the Complaint.

20. MushyGushy admits the allegations set forth in paragraph 20 of the Complaint.

21. MushyGushy denies the allegations set forth in paragraph 21 of the Complaint.

22. MushyGushy admits the allegations set forth in paragraph 22 of the Complaint.

23. MushyGushy denies the allegations set forth in paragraph 23 of the Complaint.

24. MushyGushy admits the allegations set forth in paragraph 24 of the Complaint.
25. MushyGushy denies the allegations set forth in paragraph 25 of the Complaint.
26. MushyGushy denies the allegations set forth in paragraph 26 of the Complaint.
27. MushyGushy denies the allegations set forth in paragraph 27 of the Complaint.

COUNT 1

28. MushyGushy incorporates by reference each of MushyGushy's answers set forth in paragraphs 1-27 above.
29. MushyGushy denies the allegations set forth in paragraph 29 of the Complaint.
30. MushyGushy denies the allegations set forth in paragraph 30 of the Complaint.
31. MushyGushy denies the allegations set forth in paragraph 31 of the Complaint.
32. MushyGushy denies the allegations set forth in paragraph 32 of the Complaint.
33. MushyGushy denies the allegations set forth in paragraph 33 of the Complaint.
34. MushyGushy denies the allegations set forth in paragraph 34 of the Complaint.
35. MushyGushy denies the allegations set forth in paragraph 35 of the Complaint.
36. MushyGushy denies the allegations set forth in paragraph 36 of the Complaint.

AFFIRMATIVE DEFENSES

37. Without conceding that any of the following necessarily must be pleaded as an affirmative defense, or that any of the following is not already at issue by virtue of the foregoing denials, and without prejudice to MushyGushy's right to plead additional defenses as discovery into the facts of the matter warrant, ClicVU hereby asserts the following affirmative defenses:

First Affirmative Defense

38. The Complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

39. Some or all of Plaintiff's claims are barred by the doctrine of laches and/or estoppel.

Third Affirmative Defense

40. MushyGushy has not infringed, directly, contributorily, by inducement, or willfully, any claim of U.S. Patent No. 6,351,265, either literally or under the doctrine of equivalents.

Fourth Affirmative Defense

41. Some or all of the claims of U.S. Patent No. 6,351,265 are invalid under one or more provisions of Title 35 of the United States Code, including at least 35 U.S.C. §§ 102, 103, or 112.

Fifth Affirmative Defense

42. Plaintiff is barred from obtaining the relief sought in the Complaint, in whole or in part, by failure to comply with the patent marking statute, 35 U.S.C. § 287(a).

COUNTERCLAIMS

43. Counterclaim-Plaintiff MushyGushy asserts the following counterclaims against Counterclaim-Defendant PixFusion. MushyGushy reserves the right to amend its Answer to assert additional counterclaims against PixFusion as discovery into the facts of the matter warrant.

THE PARTIES

44. MushyGushy is a New Jersey corporation having its principal place of business in Parsippany, New Jersey.

45. According to paragraph 1 of the Complaint, PixFusion is a Delaware limited liability company having its principal place of business in New York, New York.

JURISDICTION AND VENUE

46. This is an action for declaratory judgment under 28 U.S.C. §§ 2201-2202, arising under the patent laws of the United States. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

47. This Court has personal jurisdiction over PixFusion because, upon information and belief, PixFusion resides and may be found in the Southern District of New York.

48. Venue is proper in this judicial district under 28 U.S.C. §§ 1391 and 1400(b).

49. An actual case or controversy exists under 28 U.S.C. §§ 2201-2202 because PixFusion has asserted claims against MushyGushy for infringement of U.S. Patent No. 6,351,265, MushyGushy denies that it has infringed U.S. Patent No. 6,351,265, and MushyGushy asserts that the claims of U.S. Patent No. 6,351,265 are invalid.

COUNTERCLAIM I - NONINFRINGEMENT

50. MushyGushy realleges and incorporates by reference all allegations set forth in paragraphs 43 through 49.

51. MushyGushy is entitled to a declaratory judgment that it does not infringe and has not infringed, directly, contributorily, by inducement, or willfully, any claim of U.S. Patent No. 6,351,265, either literally or under the doctrine of equivalents.

52. This case is exceptional under 35 U.S.C. § 285.

COUNTERCLAIM II - INVALIDITY

53. MushyGushy realleges and incorporates by reference all allegations set forth in paragraphs 43 through 52.

54. MushyGushy is entitled to a declaratory judgment that the some or all of the claims of U.S. Patent No. 6,351,265 are invalid under one or more provisions of Title 35 of the United States Code, including at least 35 U.S.C. §§ 102, 103, and 112.

55. This case is exceptional under 35 U.S.C. § 285.

RELIEF REQUESTED

WHEREFORE, MushyGushy respectfully requests that the Court:

- A. Enter a judgment in MushyGushy's favor as to all of Plaintiff's claims in this action;
- B. Declare that MushyGushy does not infringe and has not infringed any claim of U.S. Patent No. 6,351,265, directly, contributorily, by inducement, or willfully, either literally or under the doctrine of equivalents;
- C. Declare invalid every claim of U.S. Patent No. 6,351,265;
- D. Declare that this case is exceptional under 35 U.S.C. § 285 and award to MushyGushy its costs and attorney's fees; and
- E. Award to MushyGushy such further relief that the Court deems just and proper.

Pursuant to Fed. R. Civ. P. 38(b), MushyGushy demands a trial by jury on all matters so triable.

Respectfully Submitted,
DARBY & DARBY, P.C.

Dated: May 27, 2008

By: s/ Pierre R. Yanney
Pierre R. Yanney (PY-0626)
DARBY & DARBY, P.C.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0042
Tel: (212) 527-7700
Fax: (212) 527-7701
E-mail: pyanney@darbylaw.com

*Attorneys for Defendant-
Counterclaim Plaintiff
MushyGushy.com, LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendant/Counterclaim Plaintiff MushyGushy.com, LLC's ANSWER and COUNTERCLAIMS was submitted to the Court's CM/ECF system on May 27, 2008 for service through the Court's Electronic Transmission Facilities upon the following:

John Lloyd Dauer, Jr.
Day Pitney, L.L.P.
Times Square Tower
7 Times Square
New York, NY 10036
(212) 297-5839
Fax: (212) 916-2940
Email: jdauer@daypitney.com

Marc Ari Lieberstein
Day Pitney, L.L.P.
Times Square Tower
7 Times Square
New York, NY 10036
(212) 297-5800
Fax: (212) 916-2940
Email: mlieberstein@daypitney.com

T. David Bomzer
Day Pitney, L.L.P.
Times Square Tower
7 Times Square
New York, NY 10036
(212) 297-2477
Fax: (212) 916-2940
Email: tbomzer@daypitney.com

Counsel for Plaintiff / Counterclaim Defendant

s/ Pierre R. Yanney
By: Pierre R. Yanney